Supreme Court, U.S.
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No. 04-1496

In The
Supreme Court of the United States

DANIEL GREIN and TIMOTHY BAKER,

Petitioners.

v.

CITY OF MENTOR, RICHARD AMIOTT, JULIAN SUSO, EDWARD WALSH, and RICHARD HENNIG,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

1. Whether the Sixth Circuit Court of Appeals properly applied the *Pickering* balancing test and correctly affirmed the District Courts Dismissal of Petitioners' First Amendment Retaliation claim.

CORPORATE DISCLOSURE

Pursuant to Supreme Court Rule 29.6, John T. McLandrich, Counsel of Record for Respondents, City of Mentor, Richard Amiott, Richard Hennig, Julian Suso, and Edward Walsh state that the City of Mentor, Richard Amiott, Richard Hennig, Julian Suso, and Edward Walsh is not a publicly held corporation and has no shares held by a publicly traded company.

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STATEMENT OF THE CASE

Petitioners' statement of the case evidences an unfortunate attempt to re-litigate facts which Petitioners never proved, while at the same time ignoring the **thousands of pages** of evidence relied upon by the District Court as well as a unanimous Sixth Circuit Court of Appeals.

Petitioners were police officers for the City of Mentor, Ohio, and active officers in the police union. (Pet. App. 6a). As union officers, Petitioners engaged in the tactic of a smear campaign against City of Mentor Police Chief Richard Amiott. (Pet. App. 17a-29a). As a result of their overzealousness, City of Mentor Police Department's Rules and Regulations, as well as local laws, were violated. For example, and without limitation, the Sixth Circuit Court of Appeals correctly recited the uncontroverted facts that:

> The officers also allegedly harassed a local bar owner who had not supported the police union. They allegedly forced a security guard to send a letter critical of [Chief] Amiott to a local newspaper. They inappropriately obtained documents concerning "voided" tickets and [Chief] Amiott's shooting records. Each time the officers took an issue to the press, they did so immediately, before Mentor could investigate the allegations.

(Pet. App. 7a).

Pursuant to the collective bargaining agreement between the City of Mentor and the Petitioners' union, the City recommended discipline against the three officers based on their misconduct. (Pet. App. 7a). An independent Arbitrator, agreed to by Petitioners' union, determined that Union President Graham should be terminated for any one of the three of four charges levied against him. (Pet. App.

21a). The Arbitrator rejected Graham's argument that he was being retaliated against for his First Amendment activities. Further, the Arbitrator found that Graham was discharged for threatening a citizen, interfering with investigations, and participating in improper complaints. (Pet. App. 21a). Notably, the Arbitrator also determined that Graham's conduct in "criticizing Chief Amiott and condemning his actions on various grounds with the specific purpose of destroying the community support that was so important to successful and efficient police operations" was unbecoming conduct which could not be tolerated. (Pet. App. 21a).

Similarly, Petitioner Grein was discharged by an independent arbitrator. (Pet. App. 26a). The arbitrator rejected Petitioner Grein's argument that he was disciplined in retaliation for exercising his First Amendment speech. (Pet. App. 26a). The Arbitrator determined, following a four-day hearing, that Petitioner Grein intended to destroy the public respect for the Police Department. (Pet. App. 26a).

Regarding Petitioner Baker, the arbitrator determined that, while the charges brought against Petitioner Baker were not done so because of any improper motive on behalf of the City, termination was not a proper discipline considering Baker's role in the misconduct of the other Union officers. (Pet. App. 28a-29a).

Petitioners omit the fact that there was an abundance of evidence which illustrated the destructive effect on the Mentor Police Department, all of which resulted as a consequence of Petitioners' campaign against Chief Amiott. For example, Mentor Police Detective Edward Ziegman, a 13-year veteran of the Mentor Police Department, testified

at Mr. Grein's arbitration that the Petitioners' smear campaign made the department look bad and divided the Department. (Pet. App. 41a). The Arbitrator in Petitioner Grein's arbitration found that when Petitioner Grein made derogatory public comments to the media about Chief Amiott and the department, he *intended* to destroy the public respect for the police department. (Pet. App. 26a). Mr. Graham's arbitrator found that Graham's conduct had the "specific purpose of destroying the community support that was so important to successful and efficient police operation." (Pet. App. 22a).

Finally, note that while both the District Court and a unanimous Sixth Circuit Court of Appeals appropriately applied the *Pickering* balancing test, the Sixth Circuit Court of Appeals observed that the City of Mentor "presented sufficient evidence to prove that the City would have terminated the employment of Graham and Grein in the absence of any protective conduct." (Pet. App. 11a). Grein and Graham do not argue that their terminations would not have been upheld based on their misconduct (threatening citizens, improperly obtaining records, destroying computer records, etc.), regardless of their allegedly protected conduct. *See, Mt. Healthy City Bd. of Educ.*, 429 U.S. 274, 287, 50 L.Ed.2d 471, 97 S.Ct. 568 (1977).

REASONS FOR DENYING THE WRIT

I. There is No Conflict Between the Circuit Courts Regarding the Correct Standard to be Applied in First Amendment Retaliation Cases.

A. The Sixth Circuit Court of Appeals correctly evaluated the facts and law relative to Petitioners' First Amendment retaliation claim and accurately applied the fact-specific *Pickering* balancing test.

Petitioners' Petition for Writ of Certiorari does not, in fact, illustrate any "split" amongst the Circuits. Petitioners merely located approximately four cases wherein a Circuit Court found that Plaintiffs *may* be able to prove to a jury that they were disciplined as a result of exercising their rights of free speech. (Pet. App. 6-8).

Here, the Sixth Circuit accurately and concisely set forth the law regarding a First Amendment retaliation claim. The Sixth Circuit set forth the well-established principle that a government employer cannot retaliate against a public employee for exercising their right to speak freely. However, the public employees' right to speech is not limitless. To establish a prima facie case of retaliation under 42 U.S.C. § 1983, the employee must show that: 1) he was engaged in constitutionally protected activities; 2) he was subjected to adverse action or deprived of some benefit; and 3) the protected speech was a substantial or motivating factor in the adverse action. *Leery v. Daeschner*, 349 F.3d 888, 897 (6th Cir. 2003). If the employee can make this showing, the burden shifts to the employer to prove, by a preponderance, that "it would have taken the same action even in the absence of the protected conduct." *Jackson v. Leighton*, 168 F.3d 903, 909

(6th Cir. 1999) (citing *Mt. Healthy City Bd. of Educ. v. Doyle*, 429 U.S. 274, 287, 50 L.Ed.2d 471, 97 S.Ct. 568 (1977)).

To prove that an employee's speech is protected, employees must satisfy a two-prong test: 1) that the speech involved "matters of public concern or interest", *Cockrel v. Shelby County Sch. Dist.*, 270 F.3d 1036, 1048 (6th Cir. 2001); and 2) that the employee's interest in the speech outweighs the employer's interest in "promoting the efficiency of the public services it performs through its employees." *Pickering v. Bd. of Educ. of Township High Sch. Dist.*, 205, 391 U.S. 563, 568, 20 L.Ed.2d 811, 88 S.Ct. 1731 (1968).

After evaluating the Petitioners' speech, the Sixth Circuit determined that Petitioners' unfounded allegations that Chief Amiott was unqualified to carry a weapon, and further, their allegation that they were subjected to issuing or meeting "ticket quotas" may be an issue of public concern. (Pet. App. 9a-10a). The Sixth Circuit thereafter thoughtfully applied the *Pickering* balancing test. (Pet. App. 10a).

Therein, the Sixth Circuit recognized the well-established rule that the City has an interest in maintaining an effective police force, free from internal division. *Brown v. City of Trenton*, 867 F.2d 318, 322-23 (6th Cir. 1989). When a police officer's speech is "reasonably calculated to create division", the speech may be unprotected because of its potential negative effect on the public. *Id.* at 322. Furthermore, the Sixth Circuit recognized the established principle that a police chief cannot be expected to "tolerate action which he reasonably believed would disrupt the office, undermine his authority, and destroy

close working relationships." *Id.* at 323 (quoting *Connick*, 461 U.S. at 155). Moreover, the Sixth Circuit cited law that a city cannot be expected to tolerate officers who use the media to disrupt the behavior in the work place and to influence personnel changes. The Sixth Circuit faced this exact scenario in the matter at issue. *McMurphy v. City of Flushing*, 802 F.2d 191, 198 (6th Cir. 1986). (Pet. App. 10a). Accordingly, the Sixth Circuit recognized that the *Pickering* balancing test is a question of law that involves a *fact specific inquiry.* (Emphasis added). *Williams v. Kentucky*, 24 F.3d 1526, 1537 (6th Cir. 1994).

Petitioners and their *Amicus Curiae* Ohio Patrolmen's Benevolent Association fail to recognize the importance of maintaining morale and authority within a police department. Indeed, both Petitioners and their *Amicus Curiae* Ohio Patrolmen's Benevolent Association petition this Court under the mistaken belief that Chief Amiott was the ultimate decision-maker in terms of whether or not Petitioners' misconduct was sufficiently disruptive to the operations of the Mentor Police Department. The record is clear that the *Arbitrators* concluded, based on hundreds of newspaper articles as well as the testimony of Detective Zigman, that Petitioners' conduct was objectively abhorrent and designed with the specific agenda of disrupting the Department. (Pet. App. 41a). The Sixth Circuit recognized that the Arbitrators' findings, Detective Zigman's testimony, the newspaper articles, as well as the Officers' own conduct was objective evidence of unacceptable, disruptive behavior. Petitioners' and their *Amicus Curiae* Ohio Patrolmen's Benevolent Association's argument that Chief Amiott should not have been the party to determine if the "whistleblowing" behavior was sufficiently disruptive is creative. (Brief of *Amicus Curiae* Ohio Patrolmen's

Benevolent Association, 6) However, their argument is not supported by any evidence in the record, and therefore, was never a part of the Sixth Circuit's analysis in the first place.

Petitioners have seemingly ignored the express contours of the law. By merely citing to cases with very different factual scenarios, Petitioners would lead this Court to believe that there is a "split" among the Circuits. Such is not the case.

Indeed, the Sixth Circuit's application of First Amendment retaliation law to the facts at hand was thorough and unremarkable. Petitioners argue that the Sixth Circuit misapplied the law, but they then proceed to argue nothing but the facts. The inescapable reality of Petitioners' Petition for Writ of Certiorari is that the law was uniformly and correctly applied. Petitioners are simply unhappy with the result.

A review of the cases Petitioners cite in support of their argument that there is a split between other circuits and the Sixth Circuit illustrates Petitioners' fundamental misunderstanding of First Amendment law.

For example, the first of Petitioners' "conflicting" cases, *O'Donnell v. Yanchulis*, 875 F.2d 1075 (3d Cir. 1989), involves a First Amendment retaliation claim wherein the Defendant/Employers argued that, as a result of Plaintiff's protected activity, the relationship between Plaintiff and his supervisors had completely deteriorated. The Third Circuit determined, after weighing the evidence pursuant to the *Pickering* balancing test, that a deterioration between a Plaintiff and his supervisors in a First Amendment retaliation case was not unexpected, and further, was an insufficient basis for the District Court to grant summary

judgment. Indeed, the Third Circuit specifically stated "the Defendants attempt, as did the District Court, to justify their decision to terminate O'Donnell solely on the basis that the working relationship *between O'Donnell and the supervisors* had completely deteriorated." (Emphasis added). *Id.* at 1062. More importantly, and as apparently lost on the Petitioners in the matter herein, the Third Circuit not only applied the *Pickering* balancing test, they focused on the fact-specific nature of the balancing test.

Petitioners engaged in an unrelenting campaign to oust the Police Chief. The overwhelming evidence, as determined by the Arbitrators, the District Court, and the Sixth Circuit, was that Petitioners' conduct was a clear violation of department policies and procedures, if not unlawful, and had an almost debilitating effect on the entire department.

Similarly, Petitioners' reliance on the 1984 case of *O'Brien v. Town of Caladonia*, 748 F.2d 403 (7th Cir. 1984) is misguided. In *O'Brien*, not only did the Seventh Circuit apply the same *Pickering* balancing test as the Sixth Circuit, the Seventh Circuit determined that Plaintiff Officer O'Brien was disciplined pursuant to unconstitutional provisions of the Caladonia Police Department's policy and procedure manual. *Id.* at 406.

Petitioners also curiously cite to two cases out of the Ninth Circuit, *Hufford v. McEnaney*, 249 F.3d 1142 (9th Cir. 2001), and *Rivero v. City and County of San Francisco*, 316 F.3d 857 (9th Cir. 2002). First, the *Rivero* case does not involve an employee/employer relationship. While the Ninth Circuit applied the same *Pickering* balancing test as the Sixth Circuit in the matter at issue, the *Rivero* case involved a municipality's cancellation of a contract with a

mortuary. Petitioners' citation to a non-employment case as support for their argument that there is a "split" amongst the circuits illustrates more than poor judgment. The *Rivero* case, which determined that the evidence of retaliation (Defendants potentially placing exploding pacemakers in Plaintiff's viscera), coupled with the evidence of Plaintiff's whistleblowing which lead to the cancellation of Plaintiff's contract (false billings, false reporting of funeral cases, illegal embalming of bodies, and bribes and kickbacks – all leading to a grand jury investigation which resulted in a report critical of the Defendants), was sufficient to create a question of fact for the jury. *Id.* at 860, 866.

Finally, Petitioners' superficial valuation of *Hufford* is of no value to their Petition. Again, the Ninth Circuit applied the same *Pickering* balancing test as the Seventh Circuit. However, the facts in *Hufford* evidenced that the Plaintiff Fire Department Captain had, indeed, uncovered a cache of pornography, including child pornography, on the Fire Department's house-station computer. *Id.* at 1145. Despite the fact that Plaintiff-Captain *Hufford* had never been the subject of discipline prior to his uncovering the pornography, he was subsequently subject to a series of discipline for conduct which it was unclear whether or not he had engaged in.

In the matter at issue, Petitioners claim to be "whistleblowers" despite the fact that they improperly obtained evidence and immediately presented their misguided beliefs to the media. It is undisputed that there were no criminal charges, internal or external discipline, or other reprimands against Chief Amiott.

Respondents further note that even a cursory review of recent case law out of the Third, Seventh and Ninth Circuits would have revealed that there is no "split." Indeed, Petitioners are able to cite to *no case* that reveals a "new, higher standard", or a different standard, for applying the well-established *Pickering* balancing test. *See*, for example, *Muti v. Schmidt*, 118 Fed. Appx. 646 (3d Cir. 2004), wherein the Third Circuit upheld the dismissal of an employee's First Amendment retaliation claim at the Motion to Dismiss stage. The *Muti* court balanced the employee's interests against the employer's consideration as to "whether the [expression] impairs discipline by superiors or . . . *has a detrimental effect on close working relationships for which personal loyalty and confidence are necessary*, or . . . interferes with the regular operation of the enterprise. (Emphasis original). *Id.* at 648 (citing *Rankin v. McPherson*, 483 U.S. 378, 388, 107 S.Ct. 2891, 97 L.Ed.2d 315 (1987)).

Petitioners also overlooked *Brooks v. University of Wisconsin Bd. of Regents*, 406 F.3d 476 (7th Cir. 2005), wherein the Seventh Circuit upheld the District Court's dismissal of an employees' First Amendment retaliation case. Similarly, Petitioners apparently ignored the Seventh Circuit's decision in *Careon, et al. v. Illinois Dept. of Human Srvs.*, 395 F.3d 786 (7th Cir. 2005), wherein the Seventh Circuit affirmed the District Court's decision to grant summary judgment in an employee's First Amendment retaliation case. Clearly, the Seventh Circuit considered that, even in the face of employee speech on matters of public concern, the government may "restrict the speech if it can carry its burden of proving that the interest of the public employee as a citizen and commenting on the matter is outweighed by the interest of the

State, as employer, in promoting effective and efficient public service." *Id.* at 791 (citing *Gustafson v. Jones*, 290 F.3d 895, 909 (7th Cir. 2002)).

Similarly, the Petitioners did not consider *Hudson v. Craven*, 403 F.3d 691 (9th Cir. 2005) wherein the Ninth Circuit affirmed the dismissal of an employee's First Amendment retaliation case. In *Hudson*, the Ninth Circuit thoughtfully and systematically applied the *Pickering* balancing test. Indeed, after determining that Plaintiff's First Amendment association was "quintessentially a matter of public concern", the Court held that "*Hudson's* claim fails because her associational interests in this context are strongly outweighed by the legitimate administrative interests of Clark College." *Id.* at 699.

Accordingly, Petitioners' allegation that there is a "split" between the circuits is patently wrong.

II. Petitioner did not bring a claim pursuant to the Whistleblower Protection Act, 5 U.S.C. § 2302(b)(8)(A).

Petitioners' request Certiorari for this Court to consider a higher standard for whistleblowers in First Amendment retaliation cases. Petitioners' request for a Writ of Certiorari should also be denied based on the fact that they never brought a cause of action pursuant to the Whistleblower Protection Act at 5 U.S.C. § 2302(b)(8)(A). Accordingly, the level of protection afforded to a Whistleblower pursuant to the Act is not an issue properly before this Court. Moreover, the level of protection afforded to "whistleblowers" was never an issue addressed by the District Court or the Sixth Circuit Court of Appeals. It is axiomatic that Petitioners' argument that this Court

should adopt a "strict scrutiny" standard for whistleblowers cannot be raised for the first time in their Petition for Writ of Certiorari to this Honorable Court.

Furthermore, Petitioners' argument that whistleblowers should be granted a strict scrutiny level of protection in First Amendment retaliation cases is not supported by any case in any District or Circuit. (Pet. App. 10-19).

Accordingly, despite Petitioners' argument that one commentator in an Ohio Northern University Law Review article has "suggested" that whistleblowers should be protected by a "strict scrutiny analysis" in First Amendment retaliation cases, Petitioners' novel argument is without precedent and is an insufficient basis upon which to grant Certiorari. (Pet. App. 10-12).

III. Alternate grounds exist to justify the decisions of the District Court as well as the Sixth Circuit Court of Appeals.

Finally, Petitioners' request for Certiorari should be denied on the basis that alternate grounds exist which support the District Court's and the Sixth Circuit Court of Appeals' decision.

As indicated, the evidence before the District Court was that an independent, union-endorsed Arbitrator determined that Officer Graham could have been terminated for any one of the three of four charges brought against him. (Pet. App. 21a). The Arbitrator found that "grievant was discharged for *threatening* Mr. Spetrino improperly, intervening in and publicizing investigation and participating in improper complaints, all of which were unbecoming conduct which impaired the morale, reputation, and

efficiency of a great Police Department." (Pet. App. 21a). Similarly, Officer Grein's termination was instituted by a separate Arbitrator. The Arbitrator determined that Grein should be terminated for his conduct which included: 1) advising other Mentor Police officers that there was a "no tolerance policy" for Mr. Spetrino (a local business owner who refused to permit a yard sign at his business which demonstrated his support for the Police Union over Chief Amiott); 2) improperly obtaining Chief Amiott's shooting qualification/range records from a closed file area and subsequently, and untruthfully, reporting to the media that the records reflected Chief Amiott was not range qualified; 3) repeatedly crashing the City of Mentor Police Department dispatch computer system; 4) prompting a local mall security guard to write a letter critical of Chief Amiott for the local newspaper; and 5) disclosing details of ongoing internal investigations to the news media. (Pet. App. 22a-25a).

In the face of the officers' unprecedented malfeasance and embarrassing behavior, the Sixth Circuit stated that "although the Plaintiffs' claims do not survive *Pickering* balancing, Mentor presented sufficient evidence to prove that the City would have terminated the employment of Graham and Grein in the absence of any unprotected conduct. *See Mt. Healthy City Bd. of Educ.*, 429 U.S. at 287; *see also Cockrel*, 270 F.3d at 1057." (Pet. App. 11a).

Accordingly, based on the fact alternate grounds existed for the District Court and Sixth Circuit Court of Appeals to grant the City's Motion for Summary Judgment, Petitioners' request for Writ of Certiorari should be denied.

CONCLUSION

For all of these reasons, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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